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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO.

PAUL KALMANOVITZ,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the District of Columbia Circuit

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QUESTIONS PRESENTED FOR REVIEW

I

CAN LIABILITY FOR VIOLATIONS OF THE PROXY SOLICITATION RULES OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT OF 1934 BE EXTENDED BEYOND THE DIRECTORS AND OFFICERS OF THE SOLICITING CORPORATION TO THE PROSPECTIVE BUYER EVEN WHERE THE ONLY SOLICITOR OF THE PROXY IS THE CORPORATION ITSELF.

II

CAN LIABILITY FOR VIOLATIONS OF SECTION 13(a) OF THE SECURITIES AND EXCHANGE ACT OF 1934 AUTOMATICALLY EXTEND BEYOND THE "ISSUER" TO INCLUDE AN INDIVIDUAL EVEN WHEN THERE IS NO FINDING OF AIDING AND ABETTING?

III

IF THE S.E.C. HAS FAILED TO ESTABLISH SCIENTER CAN AN INJUNCTION THEREAFTER ISSUE FOR VIOLATIONS OF SECTION 10(b) AND RULE 10b-5?

Falstaff Brewing Corporation and Paul Kalmanovitz v. the Securities and Exchange Commission were all of the parties to the proceedings in the Court below. Falstaff Brewing Corporation has no interest in the outcome of this appeal.

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To the United States Court of Appeals

For the District of Columbia Circuit

PAUL KALMANOVITZ, your petitioner, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the

United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on May 29, 1980.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

CAN LIABILITY FOR VIOLATIONS OF THE PROXY SOLICITATION RULES OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT OF 1934 BE EXTENDED BEYOND THE DIRECTORS AND OFFICERS OF THE SOLICITING CORPORATION TO THE PROSPECTIVE BUYER EVEN WHERE THE ONLY SOLICITOR OF THE PROXY IS THE CORPORATION ITSELF.

II

CAN LIABILITY FOR VIOLATIONS OF SECTION 13(a) OF THE SECURITIES AND EXCHANGE ACT of 1934 AUTOMATICALLY EXTEND BEYOND THE "ISSUER" TO INCLUDE AN INDIVIDUAL

EVEN WHEN THERE IS NO FINDING OF AIDING AND ABETTING?

III.

IF THE S.E.C. HAS FAILED TO ESTABLISH SCIENTER CAN AN INJUNCTION THEREAFTER ISSUE FOR VIOLATIONS OF SECTION 10(b) AND RULE 10b-5?

STATEMENT OF THE CASE

Falstaff Brewing Corporation is one of the very few remaining nationally marketed, independent breweries in the United States. Since the mid-1960's, however, Falstaff's sales had been hurt. Having expanded from regional to national marketing in 1970, Falstaff struggled to stay alive in the face of competition from the dominant national breweries.

These and other circumstances led

Falstaff into default on the working capital and other requirements in its institutional loans. For the year ending December 31, 1974, Falstaff reported losses of 3.8 million dollars. As the institutional lenders secured their collateral, Falstaff's financial strength deteriorated rapidly and the Company found itself in an "extremely tight cash position" for a long period of time and there was no relief in sight. On February 24, 1975, Falstaff's independent accountants, Haskins & Sells, advised the Board that unless Falstaff had a specific financing plan, Haskins & Sells would have to render a "failing company" opinion. Falstaff was apparently unable to meet its obligations as they came due and its bankruptcy was virtually certain.

In the fall of 1974, in order to reduce brewing over capacity, Falstaff,

headquartered in St. Louis, began negotiating with an outside party, Mr. Paul Kalmanovitz, of San Francisco, for the sale of its San Francisco Brewery. In October, 1974, Mr. Kalmanovitz contracted to purchase Falstaff's San Francisco Brewery and to produce Falstaff beer for $1.38 per barrel. Mr. Kalmanovitz voluntarily advanced $500,000.00 cash upon signing the contract although payment was not due for several weeks. This advance payment, and discussions with Mr. Kalmanovitz, led Falstaff's management to believe that he might be interested in investing in Falstaff. Subsequently, near the end of January, 1975, as Falstaff's financial strength further deteriorated, its management decided to "probe" Mr. Kalmanovitz about a possible investment and accordingly, Falstaff

arranged a meeting with Mr. Kalmanovitz for January 20, 1975.

On March 12, 1975, Falstaff's management succeeded in obtaining Mr. Kalmanovitz's agreement to a stock purchase agreement by which he was to invest Ten Million dollars in cash and personally guarantee an additional Ten Million of Falstaff's trade debt. Throughout the negotiations of the stock purchase agreement with Falstaff, Mr. Kalmanovitz, who is not a lawyer, and has little formal education, acted for himself without legal counsel. Falstaff, however, was represented by its President, Mr. Gutting, and its general counsel, Mr. McClellan, who had represented the Company in securities and corporate law matters for over twenty years, was a member of the Board of Directors and of its Management

Committee.

The Stock Purchase Agreement provided that in exchange for the Ten Million in cash, Falstaff would provide Mr. Kalmanovitz one hundred thousand (100,000) shares of its new, Class A, $100.00 par value convertible preferred stock with forty-five votes per share. Since Falstaff had less than 4.5 million shares of its common stock outstanding at the time, the Stock Purchase Agreement gave Mr. Kalmanovitz slightly more than fifty percent of the voting power. In addition to the commitments in the Stock Purchase Agreement, and not as part of the consideration for that Agreement, Mr. Kalmanovitz agreed with a can supplier, Continental Can Company, to guarantee a Ten Million credit to Falstaff for the purchase of beer cans.

The Stock Purchase Agreement was

drafted by Falstaff's general counsel, McClellan. The Agreement specified that the transaction was subject to stockholder approval and that "the Company will call a meeting of stockholders for the purpose of obtaining the stockholders approval."

Mr. McClellan had prepared drafts of the 1975 Proxy Statement several weeks before the Stock Purchase Agreement was executed. After the Agreement had been executed, on March 13, 1975, McClellan and his law associate presented to the S.E.C. a revised Proxy Statement setting forth the terms of the deal with Kalmanovitz. After additional discussions with the S.E.C., McClellan completed drafting the second amended proxy statement and with a few additional changes it was used.

Thus, it was Falstaff's general counsel, McClellan, who drafted the 1975 Proxy Statement recommending and soliciting stockholder approval on behalf of Falstaff's management.

The final Proxy Statement and the Stock Purchase Agreement were reviewed and approved by the Falstaff Board of Directors at its meeting in St. Louis on March 31, 1975, and the Proxy Statement was mailed to stockholders that same day. Also on March 31, 1975, Falstaff's Vice-President, Secretary and Treasurer, William J. Healy, executed a Default Waiver Agreement with the lenders' collateral agent which included the provision that Falstaff would make no loan payments other than on a pro-rata basis.

There is no dispute in this action

that the 1975 Falstaff Proxy Statement drafted by Mr. McClellan and approved and distributed by Falstaff's management was misleading in its failure to disclose that Falstaff had agreed to pledge its assets to secure its outstanding institutional loans and that Falstaff had agreed on March 31, 1975, to make all loan repayments on a pro-rata basis. In April, Mr. Kalmanovitz learned for the first time that Falstaff had signed the Default Waiver Agreement.

On April 28, 1975, the stockholders approved the transaction, the stock sale to Mr. Kalmanovitz was completed, and for the first time he took charge of Falstaff's affairs.

The S.E.C. charged and the trial court found that Falstaff's 1975 Proxy

Statement violated Section 10(b) and 14(a) of the 1934 Act as a result of false and misleading statements with respect to: its description of General Brewing Company's acquisition of Falstaff's San Francisco Brewery; Mr. Kalmanovitz's acquisition of voting control of Falstaff and the corresponding dilution of shareholder voting power; the Continental Can credit arrangement; and Falstaff's difficulties with its lenders, including the mortgaging of its assets and the pre-payment restriction.

The trial court found further that Falstaff and Mr. Kalmanovitz violated Section 13(a) of the 1934 Act by failing to disclose these same events in Falstaff's 1975-1976 periodic reports (Forms 8-K, 10-K and 10-Q) and by failing to file

timely Form 8-K reports disclosing several of the same transactions.

All of these infractions when viewed in the context in which they occured, are essentially technical in nature. In addition, virtually all of these violations stem from one set of transactions in 1975 - - transactions by which Mr. Kalmanovitz invested more than Thirty Million in Falstaff (10 Million in cash), 10 Million in five year guarantee of accounts receivable and 11.6 million guarantee of Continental Can credit, paid off virtually all of the corporate debt and successfully staved off imminent bankruptcy. Shortly after Mr. Kalmanovitz's investment, a new management took charge, and they were responsible for the successful operation of the corporation.

The Falstaff officers, directors,

lawyers and accountants who were responsible for preparing the original misleading document, the 1975 Proxy Statement, and for failure to file Forms 8-K in 1975, are no longer associated with Falstaff.

Mr. Kalmanovitz does not control any other public corporation; he is not involved in the securities or brokerage business; and his business activities do not present further temptations to violate the law.

In addition, the bulk of the violations found by the trial court were either perpetuated by or stem from misrepresentations made by prior management of Falstaff and are an insufficient basis upon which to find a likelihood of recurring violations by the present management.

An appeal followed from the decision of the United States District Court for the District of Columbia entered on October

28, 1978, and December 5, 1978, granting permanent injunctive relief for violations of Section 14(a), 13(a) and Section 10(b) of the Securities and Exchange Act of 1934. (15 U.S.C. 78 N(a), 15 U.S.C. 78m(a) and (d), and 15 U.S.C. 78J(b)).

ARGUMENT

I

CAN LIABILITY FOR VIOLATIONS OF THE PROXY SOLICITATION RULES OF SECTION 14(a) OF THE SECURITIES EXCHANGE ACT OF 1934 BE EXTENDED BEYOND THE DIRECTORS AND OFFICERS OF THE SOLICITING CORPORATION TO THE PROSPECTIVE BUYER EVEN WHERE THE ONLY SOLICITOR OF THE PROXY IS THE CORPORATION ITSELF.

The trial court found and the Court of Appeals affirmed the finding that Mr. Kalmanovitz violated Section 14(a) of the Securities Exchange Act of 1934 in connection with the 1975 Proxy Statement. At the time the 1975 Proxy Statement was issued

to solicit stockholder proxies, Mr. Kalmanovitz was neither an officer, nor director, nor controlling stockholder of Falstaff Brewing Corporation. Nonetheless, the trial court found and the Court of Appeals affirmed the fact that he was liable under Section 14(a) of the 1934 Act and Rule 14(a)9 in that he "permitted the use of his name to solicit 1975 Proxy".

It is clear that Mr. Kalmanovitz had no part in the drafting of the proxy statement and the stockholder's meeting was called by the Company for the purpose of soliciting stockholder approval of the proposed sale of preferred stock to Mr. Kalmanovitz. In fact, the proxy statement itself expressly declared that proxies were being solicited by and on behalf of the management of the Corporation of which

Mr. Kalmanovitz was not a part. The Court of Appeals felt that since Mr. Kalmanovitz's name appeared eleven times in the nine page proxy statement, and due to the fact that Mr. Kalmanovitz saw a first draft over a week before it was mailed to the shareholders that he had permitted the "use of his name in the solicitation."

It is clear that the simple appearance of one's name in a proxy statement does not trigger liability for any misstatement appearing therein. Further, S.E.C. Rule 14(a)9, proscribes false or misleading material statements or admissions in proxy solicitations but it does not further specify those individuals falling within its ambit, simply stating that it applies to any "solicitation subject to this regulation".

Since there was no solicitation by

Mr. Kalmanovitz, the trial court and the Court of Appeals found that in order to attach liability to Mr. Kalmanovitz, there had to be a "substantial connection" to the solicitation effort by Mr. Kalmanovitz.

The "substantial connection" standard was drawn by the Court from Yamamoto v. Omiya, 564 F. 2d 1319 (9th. Cir. 1977). There, a corporation, Investor's Finance, Inc., solicited stockholder proxies to approve the sale of its principle asset -- the "Investor's Finance Building" -- to an outside buyer. A disenchanted stockholder charged that the proxy statement was false. The Ninth Circuit affirmed a summary judgment in favor of the buyer,

> "The mere presence of (the buyer's) name in the materials (probably required by the S.E.C.) did not reveal any significant control by (him) over the statement, or his adoption of it,

> that was sufficient to justify attaching liability to him. It is hardly conceivable that the mere revelation that (this particular buyer) was the proposed purchaser could be an inducing factor in the granting of a shareholder's proxy."

564 F. 2d at 1323 (footnote omitted).

In the instant case, as in Yamamoto, the claim of liability rests on the fact that Mr. Kalmanovitz's name appears in the proxy statement. In fact, he neither had any control over the proxy statement, nor did he participate in the drafting or approval by Falstaff's management, nor did the proxy statement itself indicate that he did. Moreover, the proxy statement contained nothing to indicate that Mr. Kalmanovitz adopted or ratified its contents.

It is true, of course, that Mr. Kalmanovitz had reached an agreement with

Falstaff Brewing Corporation, on the terms of the purchase contract. Following, however, the teachings of the Ninth Circuit, it is clear that the mere naming in the solicitation materials of Mr. Kalmanovitz who, through arms length bargaining had reached an agreement with the corporation does not in and of itself add anything to the shareholders' decision and cannot trigger liability under Section 14(a). See also, Del Noce v. Delyar Corporation, (1975-1976) Fed. Sec. L. Rep. (CCH) Section 95, 670 (S.D.N.Y. 1976); Beatty v. Bright, 1972-1973 Fed. Sec. L. Rep. (CCH) Section 93, 599 (S.D. Ia. 1972).

The Court of Appeals recognized the standards adopted in Yamamoto but placed their emphasis on the case of Chris-Craft Industries, Inc. v. Independent Stockholders Committee, 354 F. Supp. 895 (D. Del. 1973).

The application of the Chris-Craft case to the instant facts was not proper and has the effect of extending Section 14(a) beyond the bounds of the statute created by Congress. In Chris-Craft, six "outsider" director nominees of a dissident shareholder group were found individually liable for Section 14(a) violations relating to their actions concerning solicitations during a bitter proxy battle. In Chris-Craft, the six outsider directors were directly and substantially responsible for the proxy solicitation material prepared for their benefit and submitted to the stockholders.

In the instant case, Mr. Kalmanovitz was an arms length purchaser of a controlling interest in the Company. He was recruited by the then management of the Company and entered into a contract by which he agreed to purchase stock.

Falstaff solicited shareholder approval and Falstaff's general counsel drafted the proxy statement by means of which Falstaff's then management obtained shareholder approval. There is nothing in the record to demonstrate that Mr. Kalmanovitz helped to draft the proxy statement or was asked to comment on it prior to its adoption by the Falstaff Board on March 31, 1975. The document itself simply outlines the nature of the transaction. Nowhere does it provide any indication that Mr. Kalmanovitz had participated in its preparation or was in any way responsible for its contents, nor did it contain any hint that he ratified or approved it. There was nothing in the Proxy Statement which would cause the shareholders to rely upon Mr. Kalmanovitz.

Despite these facts, the Court of

Appeals contends that Mr.Kalmanovitz had a duty to correct any errors which might have appeared in the proxy statement prepared by the management. The Court of Appeals bases its decision on the teachings of the Chris-Craft case and used that district court decision as their guideline herein.

It is apparent that the Ninth Circuit Opinion of Yamamoto is a clear expression of the congressional intent arrived at in formulating the Securities Exhange Act of 1934. This is especially true in light of the fact that this Court has emphasized as recently as Chiarella v. U.S., 100 S. Ct. 1108 (1980), that

> "the 1934 Act cannot be read more broadly than its language and statutory scheme reasonably permit."

Id at 1118.

As in Chiarrella, this Court should not permit the Securities Act to be expanded

beyond the mandate created by Congress. Just as this Court held that Mr. Chiarrella was not liable for his acts (which technically were violative ov the Securities Act), due to his remote position, the same should be true of Mr. Kalmanovitz.

As in Chiarrella, Mr. Kalmanovitz had no duty to the shareholders to protect them from the acts of the Company for which he had no legal nexus.

In this instance, this Court should grant Certiorari to examine the extent to which the Securities Act of 1934 will be applied to those whose name appear in proxy statements. It is clear that to fulfill the congressional purpose, the standard to be used is the one adopted in Yamamoto. Clearly in addition to the mere presence of a buyer's name in proxy materials there must be either some evidence of control of the buyer over the

proxy statement, or some indication in the statement that the buyer has adopted or ratified its contents before liability under the Securities Exchange Act of 1934 will be extended. See 564 F. 2d at 1523. The Court of Appeals herein has stretched the reach of Section 14(a) beyond the Congressionally dictated limits. This Court should set forth the controlling test in this area to avoid both confusion in the Circuits and the harsh result arrived at herein.

II

CAN LIABILITY FOR VIOLATIONS OF SECTION 13(a) OF THE SECURITIES EXCHANGE ACT OF 1934 AUTOMATICALLY EXTEND BEYOND THE "ISSUER" TO INCLUDE AN INDIVIDUAL EVEN WHEN THERE IS NO FINDING OF AIDING AND ABETTING.

The trial court concluded and the Court of Appeals affirmed the finding that there had been violations of Section 13(a) of the Securities and Exchange Act

of 1934 by both Falstaff Brewing and Mr. Kalmanovitz. The Court found violations with respect to omissions from Falstaff's Forms 10-K and 10-Q for 1975 and 1976, for the failure to file Forms 8-K concerning various events in 1975 and for omissions from the Form 8-K filed by Falstaff in January, 1976.

In holding Mr. Kalmanovitz personally liable under Section 13(a), neither the lower court nor the court of appeals offered any precedent or analysis to support their conclusion, nor was there ever an express determination that Mr. Kalmanovitz had even aided or abetted in the violation.

As has often been noted, "the starting point in every case involving construction of a statute is the language itself." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976). Section 13A of the 1934 Act provides that, "every issuer of a

security registered pursuant to section 12 of this Title shall file with the Commission . . . " periodic reports in order to keep its Section 12 registration "reasonably current". 15 U.S.C. §78M (a) 1976.

It is clear from reading section 13(a) of the Statute that it applies only to issuers. There is nothing in the statute to indicate that board members, corporate officers, or any other non-issuer individuals are automatically liable for the issuer's transgressions with respect to periodic reports. In fact, not until February 15, 1979, did the S.E.C. adopt a new rule, 13B-2-2, which expressly prohibits the "officers and directors of an issuer from making false, misleading or incomplete statements to any accountant in connection with . . . preparation of

required reports (under Section 13(a)). "
"S.E.C. Release No. 15570, (current) Fed. Security L. Rep. (CCH) Section 81-959 (February 15, 1979).

The importance of this new distinction is that Congress did not intend that "officers" or "directors" as a class be automatically liable as principals for the acts of the Corporation under Section 13(a), for Congress created liability for them in Rule 13B-2-2.

It has clearly been the policy in the federal courts that individual officers and directors may be liable under Section 13(a) only where they are found to have aided and abetted the issuers violations. See e.g. S.E.C. v. Kalvex, Inc., 425 F. Supp. 310, 315-17 (S.D.N.Y. 1975). The Court of Appeals herein concluded that despite the absence of an express conclusion of law that Mr. Kalmanovitz aided or abetted, the district court's opinion

would stand. The obvious effect of this decision is to stretch the scope of liability of Section 13(a) beyond the "issuer" to include all other individuals even those who have not been found to have aided or abetted in the violation.

The present decision clashes directly with the case of S.E.C. v. Savoy Industries, Inc., ____ U.S. App. D.C. ____, 587 F. 2d 1149 (1978). In Savoy, the district court had found that certain filings had been deficient and then held the defendant liable stating that the defendant's group had been in control. On appeal, the court noted the absence of any finding of fact concerning the defendant's personal participation. 587 F. 2d 1170. The court then remanded the case due to the inability to infer the basis for the district court's finding.

In the present case, the Court of Appeals distinguished the facts herein from those found in Savoy and inferred in their opinion that the district court had provided sufficient findings of fact and conclusions of law even though the Court had failed to find that Mr. Kalmanovitz had aided or abetted in the 13(a) violation. In such a circumstance as this, the Court has by its decision extended the scope of liability under 13(a) to those who have not been found to have aided or abetted. This is undeniably contrary to the congressional intent found in the statute. The Statute clearly refers to liability for issuers and in this case, Mr. Kalmanovitz was clearly not an issuer. The fact that the Court of Appeals wants to infer a conclusion of law is weak precedent for imposing an injunction as

was done by the district court.

In this circumstance, the court should grant certiorari to examine the holding of the Court of Appeals herein and to determine whether or not other courts should expand the policies established by Congress by judicial fiat.

The obvious conclusion to be reached is that the lower courts cannot expand the statute beyond the limits imposed by the drafters of the law. This Court should examine the application of the Securities Act herein and set forth clear guidelines for future actions. Without a more precise exposition of the Congressional intent in this area, there will be a chilling effect on future investors who seek to become involved with public corporations.

III.

IF THE S.E.C. HAS FAILED TO ESTABLISH SCIENTER CAN AN INJUNCTION THEREAFTER ISSUE FOR VIOLATIONS OF SECTION 10(b) AND RULE 10B-5?

In the instant case, the district court found and the Court of Appeals affirmed the finding that Falstaff and Kalmanovitz had violated Section 10(b) of the Act, 15 U.S.C. 78J (1976), and Rule 10b-5 thereunder, 17 CFR Section 240.10B-5 (1979). These sections prohibit manipulative and deceptive practices in the purchase and sale of securities. The trial court found that Paul Kalmanovitz engaged in such practices in submitting misleading proxy statements to shareholders in 1975, (the same acts for which they imposed liability under Section 13(a) and 14(a)) and for other violations alleged regarding a later proxy statement.

The trial court found that Mr. Kalmanovitz knew of the existence of the misstatements and omissions in the 1975

Proxy Statement and that this knowledge was sufficient to establish a finding of scienter. The trial court held that,

> "the evidence in this record amply establishes that Falstaff and Kalmanovitz filed reports with the Commission with such knowledge of the facts or reckless disregard for the truth that scienter, however that term may be defined by the cases . . ., has been amply demonstrated on the part of both Kalmanovitz and Falstaff."

It was unfortunate that the Court of Appeals did not have the benefit of this Court's decision in the case of S.E.C. v. Aaron, 48 U.S.L.W. 4609, (1980). In the Aaron case, recently decided by this Court, it was expressly held that

> "(t)he Commission is required to establish scienter as an element of a civil enforcement action to enjoin violations of . . . Section 10(b) of the 1934 Act, and Rule 10(b)-5 promulgated under that Section of the 1934 Act."

Id. at 4615.

Since the early case of Ernst & Ernst v. Hockfelder, 425 U.S. 185 at 193, n. 12 (1976), "scienter" has been defined as "a mental state embracing intent to deceive, manipulate or defraud."

This definition was also recently affirmed in the Aaron case. In the Aaron case, the district court had found that Aaron had intentionally failed to discharge his supervisory responsibility, in that he did not stop employees under his control from making statements which he knew were false to prospective investors. The district court went on to hold that this intentional failure to take action was sufficient to establish scienter. That decision was affirmed by the court of appeals; however, this Court reversed and vacated the injunction issued and remanded the matter for further proceedings.

In the instant case, the district

court and the court of appeals attached 10(b) and 10b-5 liability against Mr. Kalmanovitz basically for the same reasons that the court imposed liability in the Aaron case. The district court and the Court of Appeals herein determined that since Mr. Kalmanovitz had known of material omissions and misstatements that this was sufficient to establish "scienter". Clearly, the courts in this case did not apply the appropriate standard of scienter as clearly set forth in the Aaron case. As in Aaron, mere knowledge is not sufficient to establish scienter. There must be a finding of an "intent to defraud". There was no such finding herein and the court's ruling is therefore void on its face.

In the instant case, a permanent injunction was issued based upon a finding of violations that were the result of

past actions. The imposition of an injunction for violations of 10b and 10b-5 that have not been legally established is a burden that the courts of this land have not and will not impose upon a person. In the instant case, the courts have only determined that Mr. Kalmanovitz knew of the alleged omissions and misstatements. There has been no finding of "a mental state embracing intent to deceive, manipulate or defraud". Under these circumstances, without any showing of a lack of good faith or intent to deceive, an injunction is not appropriate. As was stated by Chief Justice Burger in his concurring opinion in Aaron, "an injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith." Id. at 4616.

Under these circumstances and with the recent edification of the law provided by the Aaron case, this Court has no choice but to issue its instructions to the Court of Appeals to vacate the injunction imposed herein. The injunction was based on a faulty formulation of the law in this area and is a drastic remedy that should not be allowed to stand upon such a weak base.

This Court has taken great pains to maintain the integrity of the Securities laws and in this instance the Court should not hesitate to act. It is evident by the most recent Aaron decision, that this Court is continuing its vigil and petitioner herein seeks relief from this Court. As in Aaron, the petitioner herein should not be forced to endure the extreme penalty of a permanent injunction. With the law in this area clearly set forth in Aaron, this

Court should grant relief to petitioner herein.

CONCLUSION

For all of the foregoing reasons, the Court should grant Certiorari herein.

Respectfully Submitted,

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